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No. 97-688

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF WASHINGTON,
Petitioner,

v.

MARTIN SHAW PANG,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Pang's response to the State's Petition for Certiorari reinforces the need for this Court to resolve outstanding issues concerning the application of the specialty doctrine when a defendant has been extradited from a foreign country. Pang acknowledges the federal circuit court split on the issue of when a defendant has standing to claim a violation of an extradition treaty. The record in this case exemplifies the confusion engendered by the circuit split. Consistent with the "no standing without protest" authority, Pang unsuccessfully sought a formal written protest from Brazil. The State, on the other hand, requested a waiver from Brazil in accordance with the "standing unless waiver" cases. By granting certiorari, the Court can finally resolve the split and end the confusion.

Pang does not attempt to defend the Washington Supreme Court's holding that the specialty doctrine bars prosecution on the murder counts; instead, he claims that some other, unnamed, principle is at work. But the decision below cannot be reconciled with prior decisions of this Court and the United States Courts of Appeals.

In the past several decades, international travel for ordinary citizens has become commonplace. The costs of travel have fallen dramatically, and visa requirements have been relaxed. As a consequence, it has become easier for a criminal suspect to flee to another nation, forcing prosecuting authorities to resort to extradition in order to obtain jurisdiction over a suspect. This case presents the Court with an excellent opportunity to resolve several outstanding extradition issues, issues that promise to arise more frequently in the coming years.

ARGUMENT

I. THE COURT SHOULD ACCEPT REVIEW TO RESOLVE THE CIRCUIT SPLIT OVER THE STANDING ISSUE.

Pang acknowledges that a split exists in the federal circuits concerning when an extradited defendant has standing to claim a violation of the doctrine of specialty. Brief in Opp. 5-6, 11-12. The decisions fall into two categories: (1) the "no standing without protest" approach, and (2) the "standing unless waiver" approach. Pet. 8-9. In this case, the Washington Supreme Court adopted the "standing unless waiver" approach, found that Brazil had not waived any objection, and held that Pang had standing to allege a violation of the extradition treaty. Pet. 52a-57a.

Pang argues that he has standing even under the "no standing without protest" approach, claiming that the Brazilian Federal Supreme Court's failure to include the murder counts in their extradition decision constitutes a

protest. Brief in Opp. 11-12. However, no court in this case has ever found that Brazil issued a protest. In fact, it is clear that Brazil has not and does not intend to protest the prosecution of Pang for murder.

Pang has repeatedly requested that the Brazilian Government issue a formal written protest, to no avail. In November of 1996, Pang's attorney faxed a letter to the Brazilian Ministry of Justice requesting that Brazil formally protest the King County Superior Court's decision to allow Pang to be prosecuted for murder. After receiving no response for several weeks, Pang's attorney again wrote to the Ministry requesting a formal written protest. Again, after receiving no response, Pang's attorney wrote a third time, requested a formal written protest, provided the mailing address for the Superior Court judge, and warned that they were preparing legal action in Brazil.[1] No protest was forthcoming.

Finally, in January of 1997, Pang's Brazilian attorneys wrote to Justice Minister Nelson Jobim, requesting that he respond to the letters from Pang's U.S. counsel. Instead of issuing a protest as requested, Minister Jobim wrote back to Pang's Brazilian attorneys, stating that "the criteria in judging the case" was for the "exclusive interpretation" of the courts in the United States. Pet. 48a.

To date, Brazil has not issued any protest to the United States Government, the State of Washington or the King County Superior Court. It is difficult to imagine a clearer case of no protest: Brazil was aware that Pang was to be prosecuted for murder, Pang requested that Brazil protest, and Brazil did not. Under the "no standing without protest" approach, Pang would have no standing to claim a violation of the extradition treaty.

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[1] It is also apparent from the correspondence that Pang's attorney spoke with several members of the Ministry of Justice by telephone.

This case is an excellent example of the unfortunate and practical consequences of allowing the circuit court split to continue unresolved. Both parties invested considerable resources to obtain written protests or waivers from the Brazilian Government given the conflicting decisions on the standing issue from the federal circuit courts.[2]

In light of the Ninth Circuit's position that an extradited defendant has standing unless the surrendering nation provides a waiver,[3] the United States Government prudently requested an explicit waiver from the Brazilian Government. Pet. 3-4. On the other hand, Pang repeatedly lobbied the Brazilian Government to issue a formal written protest, presumably as a result of the "no standing without protest" cases. This Court should accept review and put an end to this uncertainty.

II. PANG IMPLICITLY CONCEDES THAT THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE SPECIALTY DOCTRINE IS INCONSISTENT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS.

The Washington Supreme Court held that the rule of specialty prohibits the State of Washington from prosecuting Pang for murder. Pet. 72a-73a. Pang does not attempt to defend this holding; instead, he argues that there is a principle "more basic" than the specialty doctrine that prohibits the State from prosecuting him. Brief in Opp. i, 8-9. By abandoning the specialty doctrine, Pang, in essence, concedes that the Washington Supreme Court's interpretation of the treaty's specialty provision cannot be reconciled with the treaty's plain language, this Court's

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[2] Pang's letter writing campaign is described above. As noted in the Petition, President Clinton became actively involved in attempting to obtain a written waiver from the Brazilian Government. Pet. 4.

[3] *United States v. Khan*, 993 F.2d 1368, 1374 (CA9 1993).

standards of treaty interpretation and numerous decisions of the United States Courts of Appeals. *See* Pet. 12-18.

Though Pang does not name the "basic" principle that prohibits the State from prosecuting him for murder, all of the cases he cites in his brief involve either the specialty doctrine or the doctrine of dual criminality. To the extent Pang suggests that it is the doctrine of dual criminality that prevents his prosecution for murder, he has confused that doctrine with the doctrine of specialty.

The doctrine of dual criminality applies prior to extradition. Parties to an extradition treaty may agree that the asylum nation may rely upon the doctrine in deciding whether a request contains extraditable offenses.[4] Dual criminality requires that the acts described in the request constitute an offense in both countries.[5] The United States-Brazil extradition treaty contains such a provision in Article III.[6]

The doctrine of specialty applies after extradition and limits the requesting nation's ability to prosecute an extradited individual for a particular offense.[7] As Pang acknowledges, it prevents the requesting nation from misleading the surrendering nation as to the reasons behind the request for extradition. *See* Brief in Opp. 8.

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[4] *Matter of Extradition of Russell*, 789 F.2d 801, 803 (CA9 1986).

[5] *See Collins v. Loisel*, 259 U.S. 309, 312 (1922); *United States v. Sensi*, 879 F.2d 888, 894 (CADC 1989). In this case, the doctrine of dual criminality was clearly satisfied because the act of committing arson, resulting in death, is a serious offense in Brazil. Pet. 24a-32a. Moreover, both arson and murder are listed as extraditable offenses in the treaty. Pet. 108a.

[6] Pang erroneously states that Article I imposes the doctrine of dual criminality. Brief of Opp. 14. In *Factor v. Laubenheimer*, 290 U.S. 276, 282-94 (1933), this Court interpreted a virtually identical treaty provision and held that it did not incorporate the doctrine of dual criminality.

[7] *United States v. Rauscher*, 119 U.S. 407, 419-20 (1886).

These two concepts are commonly joined in extradition treaties. When the treaty specifies that dual criminality is the method of determining whether an offense is extraditable and the treaty's specialty provision allows the receiving state to prosecute only those offenses for which extradition is *granted*, the specialty provision acts as an enforcement mechanism for the surrendering nation's dual criminality analysis.

These two doctrines, however, were not joined by the drafters of the United States-Brazil extradition treaty. The treaty's specialty provision does not restrict prosecution after extradition to only offenses considered extraditable by the surrendering nation. Instead, the specialty provision limits prosecution to offenses listed in the extradition *request*. Pet. 119a. As a consequence, the parties eliminated the ability of the surrendering nation to *partially* grant an extradition request.[8] Under the terms of the current treaty, Brazil and the United States have the power to grant extradition on either all or none of the offenses listed in the request.[9] Thus, once Pang was extradited, Brazil could not prevent the United States from prosecuting him for all the charges listed in the extradition request.

Pang claims that, unless his position is adopted, the entire extradition proceedings conducted in Brazil would be rendered meaningless. Brief in Opp. 13. This assertion is meritless. The extradition proceedings were nec-

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[8] Pang argues that because the Brazilian Supreme Court apparently assumed it had the power to grant partial extradition, the United States is bound by that determination. Brief in Opp. 14-15. However, it is not clear that the Brazilian Supreme Court ever considered the import of the treaty's specialty provision, and, in any event, this Court is not bound by Brazil's interpretation of the treaty. *Ex Parte Charleton*, 185 F. 880 (1911), *aff'd*, *Charleton v. Kelly*, 229 U.S. 447 (1912).

[9] Presumably, Brazil could have ensured that Pang would not be prosecuted for murder by rejecting the initial extradition request and insisting on a new request that only included the arson charge.

essary in order for Brazil to determine whether Pang should be extradited. Had the court determined that none of the crimes were extraditable or that they constituted political offenses, it could have refused extradition.

Pang, perhaps somewhat facetiously, suggests that if he is prosecuted for murder, Brazil may refuse to consider or grant future extradition requests from the United States. Brief in Opp. 14. This is not a valid reason for disregarding the plain language of the treaty. This Court has recognized that such concerns are matters for the Executive Branch and that the diplomatic approach, rather than unilateral action by a court, is best suited for resolving such issues.[10] Given Brazil's lack of response to Pang's entreaties, it appears highly unlikely that his predictions of a crisis will be realized.

Pang's efforts to find new justification for the Washington Supreme Court's decision is a clear indication of the flaws in that decision. This Court should accept review, reverse that decision and allow the State of Washington to prosecute Pang for all of the charges listed in the extradition request, including the four counts of first-degree murder.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the Washington Supreme Court.

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[10] *See United States v. Alvarez-Machain*, 504 U.S. 655, 669 n.16 (1992).

Respectfully submitted,

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